UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
	§	
CYRUS II, L.P., BAHAR DEVELOPMENT, INC., and MONDONA RAFIZADEH	§	Jointly Admin. Under Case No. 05-39857-H1-7
	§	
	§	(Chapter 7)
Debtors.	§	
	§	
	§	
RODNEY D. TOW, AS THE CHAPTER 7 TRUSTEE, *ET AL.*	§	Adversary Proceeding No. 07-3301
	§	
Plaintiffs.	§	
	§	
v.	§	
	§	
SCHUMANN RAFIZADEH, *ET AL,*	§	
	§	
Defendants.	§	

SUPPLEMENT TO DEFENDANT SCHUMANN RAFIZADEH'S POST HEARING BRIEF IN SUPPORT OF REQUEST FOR DISCOVERY ON RELATED TO DOUBLE RECOVERY ON PROOF OF CLAIM FILED BY ORIX CAPITAL MARKETS, LLC (RELATED TO DOC. 699)

I.

Introduction

1. In Docket 445 paragraph 10, and many times previous to that, Orix claimed that the UBS Settlement Payment was compensation for "overpayment" for under-performing loans, and thus not "liquidation proceeds" to be allocated to a loan. Then, on July 3, 2008, Orix produced two legal opinion letters obtained in 2004, that state that the Settlement Payment was liquidation proceeds and that it had to be applied as such under REMIC. A copy of those opinion letters are attached as Exhibit "A" and "B".

2. Thus, this Supplement to Schumann Rafizadeh's post hearing brief on the double recovery issue was made necessary by the recent production of these documents by Orix. These

documents are legal opinions obtained by Wells Fargo in October 2004, shortly after the Settlement Payment was received. In summary, the first letter states that the Settlement Payment constituted Liquidation Proceeds within the meaning of the PSA. As discussed previously and below, Liquidation Proceeds **must** be applied to the related mortgage loans. The second letter says that receipt of the UBS settlement payment does not violate REMIC. Thus, assuming the Settlement Payment is applied to the related mortgage loans, REMIC is not violated.

3. What these opinion letters do not say is that the Settlement Payment represented an overpayment for a pool of loans which the MLMI Trust, Wells Fargo and/or Orix can simply keep and not apply to the related mortgage loans. The reason these letters do not say this is because the receipt of such a payment would constitute income prohibited by the REMIC Tax Code provisions as discussed in Rafizadeh's original post-hearing brief.

II.

Liquidation Proceeds

4. The Pooling and Service Agreement ("PSA") governing the MLMI Trust contains a specific provision instructing the parties how to deal with Liquidation Proceeds. This is section 3.02(b) which provides as follows:

> (b) All amounts collected on any Mortgage Loan in the form of payments from Mortgagors, Insurance and Condemnation Proceeds or Liquidation Proceeds shall be applied to amounts due and owing under the related Mortgage Note or Mortgage Notes and Mortgage (including, without limitation, for principal and accrued and unpaid interest) in

This provision of the PSA is unequivocal. It absolutely requires Liquidation Proceeds to be applied to the related Mortgage Note or Mortgage Notes. As stated in the attached letters, the Settlement Payment constituted Liquidation Proceeds. They are not "overpayments" as Orix has attempted to convince this Court on numerous occasions. Thus, under PSA Section 3.02(b) it should have been applied to the related mortgages.

III.

Discovery Needed

5. Rafizadeh believes that the mortgages the Settlement Payment should have been applied to are Arlington and Lee Hall. If he is correct even in part, then the ultimate damages sought by the Plaintiffs in this case under TUFTA must be reduced, since TUFTA only allows the avoidance of transfers necessary to pay claims. To date, Rafizadeh has been prevented from seeking discovery on this issue.

IV

Conclusion

6. Despite the fact that Wells Fargo and Orix have known since October 2004 that the Settlement Payment constituted Liquidation Proceeds, Orix has successfully prevented Rafizadeh from obtaining discovery on this important issue by representing to this Court on numerous occasions over the past three years that it represented an "overpayment" for a pool of loans and not "liquidation proceeds" that had to be applied to a loan. See, e.g., Doc. Nos. 445 and 595. If discovery were permitted, Rafizadeh may have obtained the attached documents years ago. Now trial of this case is only a few months away and a significant series of depositions are about to begin. Rafizadeh respectfully submits that the Court's ban on "double recovery" discovery based on Orix's troubling prior representations should be lifted so that he can be afforded a full and fair trial on the merits.

DATED: July 8, 2008

Respectfully Submitted,

WEYCER, KAPLAN, PULASKI & ZUBER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail and/or first class mail, postage prepaid, on July 8, 2008, on the following parties:

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